TAN GOAT ENG & ANOR v. ROZDENIL TONI (AS ADMINISTRATOR OF ESTATES OF TONI ISMAIL & NORMY MOHAMED KHATIF; DECEASED)

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
IDRUS HARUN JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1138-07-2014]
15 JUNE 2015

LAND LAW: *Transfer – Void instruments – Wrongful and illegal transfer of land – Forged instruments – Property wrongfully and illegally sold to initial purchasers and transferred to another and was charged to bank – Default in repayment of loan – Property auctioned and sold again – Claim against initial purchasers of land by administrator of property in capacity as original proprietor – Whether registration of names of initial purchasers defeasible – Allegation that property no longer registered in names of initial purchasers – Whether s. 340(2) of National Land Code available to original proprietor – Whether original proprietor could have recourse – Whether initial purchasers liable for damages to original proprietor*

The respondent ('the plaintif') was the administrator of the estates of his deceased parents which included a property in Cheras, Kuala Lumpur ('the property'). The plaintiff's elder brother had wrongfully and illegally sold and transferred the property to the appellants ('the third and fourth defendants') using a forged instrument. The third and fourth defendants subsequently sold and transferred the property to the fifth defendant who then charged the property to the bank as security for a loan. As a result of a default in repayment of the loan, the property was foreclosed and purchased at an auction by the seventh defendant, the current registered owner of the property. In the High Court, the plaintiff claimed against the third and fourth defendants in his capacity as the original proprietor of the property. The High Court Judge ('HCJ') held that the title of the third and fourth defendants, as immediate purchasers of the property, was defeasible as registration in their names had been obtained by means which were insufficient or void. It was further held that while the third and fourth defendants had purchased the property in good faith for value, this was of no avail, in light of the express provision of s. 340(2)(b) of the National Land Code ('NLC') which stipulated that where the registered title or interest of a person is obtained by forgery or by means of a void instrument, the title or interest of any such person or body shall not be indefeasible. Accordingly, the HCJ awarded damages *in lieu* of a re-transfer of the property. Hence, the present appeal. The third and fourth defendants argued that s. 340(2) of the NLC was not available to the plaintiff because the property was no longer registered in the names of the third and fourth defendants but had become the subject matter of subsequent

A transactions, resulting in it being registered in the name of the seventh defendant. As such, the plaintiff could no longer have recourse to this statutory provision.

Held (dismissing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

B

(1) Section 340(3) of the NLC clearly and expressly provides that where there has been a transfer of title premised on a void instrument rendering such title defeasible as envisaged in sub-s (2), such transfer of title may be set aside not only when it is in the hands of a party who acquires immediate title but is also liable to be set aside if it is subsequently transferred or registered in the names of purchasers who acquire title subsequent to the immediate purchaser. Applying sub-s. (3) to the instant case, since the title of the third and fourth defendants was defeasible under s. 340(2)(b) of the NLC because it was obtained by means of a void instrument, it was liable to be set aside in the hands of all subsequent transferees. (paras 15 & 16)

C

D

(2) The plaintiff's remedy for the loss of property, which was statutorily provided for in s. 340(2) of the NLC, was solely against the third and fourth defendants. As they were not in the position to return the property to the plaintiff, they were bound to make good such loss by paying damages. The fact that the third and fourth defendants were 'innocent', in that they were unaware of the falsity of the instruments, did not absolve them from such liability because it was statutorily imposed under the said section. The contention that no damages were payable because the plaintiff was not 'wronged' by the third and fourth defendants was therefore misconceived. The third and fourth defendants had, in fact, acquired benefit from this property as they had on-sold it to the fifth defendant for a profit. (paras 22 & 23)

E

F

Bahasa Malaysia *Translation Of Headnotes*

G Responden ('plaintif') merupakan pentadbir harta pusaka kedua-dua ibu bapanya yang telah meninggal dunia yang mana termasuk sebuah hartanah di Cheras, Kuala Lumpur ('hartanah tersebut'). Abang plaintif telah menjual dan memindah milik hartanah tersebut secara salah dan menyalahi undang-undang kepada perayu-perayu ('defendan ketiga dan keempat') dengan menggunakan instrumen yang dipalsukan. Defendan ketiga dan keempat seterusnya menjual dan memindah milik hartanah tersebut kepada defendan kelima yang kemudiannya memajakkan hartanah tersebut kepada bank sebagai cagaran untuk pinjaman. Akibat keingkaran dalam pembayaran semula pinjaman, hartanah tersebut digadai janji dan dibeli semasa lelongan oleh defendan ketujuh yang kini merupakan pemilik berdaftar hartanah tersebut. Di Mahkamah Tinggi, plaintif menuntut daripada defendan ketiga

H

I

dan keempat dalam kapasitinya sebagai pemilik asal hartanah tersebut. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa hak milik defendan ketiga dan keempat, sebagai pembeli terdekat hartanah tersebut, boleh disangkal kerana pendaftaran di bawah nama mereka telah diperolehi melalui cara yang tidak memadai atau tidak sah. Diputuskan selanjutnya bahawa walaupun defendan ketiga dan keempat telah membeli hartanah tersebut secara suci hati bagi satu nilai, ini tidak berjaya, berdasarkan peruntukan nyata s. 340(2)(b) Kanun Tanah Negara ('KTN') yang menyatakan bahawa di mana hak milik berdaftar atau kepentingan seseorang diperolehi melalui cara penipuan atau melalui cara instrumen yang tidak sah, hak milik atau kepentingan orang atau badan tersebut tidak menjadi tidak boleh disangkal. Dengan itu, HMT mengawardkan ganti rugi sebagai ganti pindah milik semula hartanah tersebut. Oleh itu, rayuan ini. Defendan ketiga dan keempat menghujahkan bahawa s. 340(2) KTN tidak terpakai kepada plaintif kerana hartanah tersebut tidak lagi didaftarkan di bawah nama defendan ketiga dan keempat tetapi menjadi hal perkara transaksi-transaksi susulan, mengakibatkan ianya didaftarkan di bawah nama defendan ketujuh. Oleh itu, plaintif tidak lagi boleh mendapat bantuan daripada peruntukan statutori ini.

Diputuskan (menolak rayuan dengan kos)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 340(3) KTN dengan jelas dan nyata memperuntukkan bahawa di mana berlaku pindah milik hak milik berasaskan instrumen yang tidak sah yang menjadikan hak milik tersebut tidak sah seperti yang dijangka dalam sub-s. (2), pindah milik hak milik sedemikian boleh diketepikan bukan sahaja semasa ia dalam tangan pihak yang terdekat memperolehi hak milik tersebut tetapi ia juga boleh diketepikan sekiranya ia seterusnya dipindah milik atau didaftarkan di bawah nama pembeli-pembeli yang memiliki hak milik selepas pembeli terdekat. Menggunapakai sub-s. (3) dalam kes ini, memandangkan hak milik defendan ketiga dan keempat boleh disangkal di bawah s. 340(2)(b) KTN kerana ia diperolehi melalui instrumen yang tidak sah, ia wajar diketepikan dalam tangan kesemua pemindah-pemindah susulan.

(2) Remedi plaintif bagi kehilangan hartanah, yang diperuntukkan secara statutori di bawah s. 340(2) KTN adalah semata-mata terhadap defendan ketiga dan keempat. Oleh kerana mereka tidak berada dalam kedudukan untuk memulangkan hartanah tersebut kepada plaintif, mereka terikat untuk mengganti semula kehilangan tersebut melalui ganti rugi. Fakta bahawa defendan ketiga dan keempat 'tidak bersalah' dalam mana mereka tidak sedar mengenai pemalsuan instrumen tidak melepaskan mereka daripada liabiliti sedemikian kerana ia tidak dikenakan secara statutori di bawah peruntukan tersebut. Hujahan bahawa tiada kerosakan

yang perlu dibayar kerana plaintif tidak dianiaya oleh defendan ketiga dan keempat, dengan itu, disalah anggap. Defendan ketiga dan keempat sebenarnya telah memperoleh manfaat hartanah ini kerana mereka telah menjualnya kepada defendan kelima untuk mendapatkan keuntungan.

Case(s) referred to:
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
National Land Code, s. 340(1), (2)(b), (3)

For the appellant - VS Viswanathan; M/s VS Viswa & Co
For the respondent - Yusman Mohd Badar; Chambers of Yusman Azlin Anwar

[Appeal from High Court, Kuala Lumpur; Writ Summons No: 21 NCVC-195-08-2012]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] The principal issue that fell for consideration in this appeal was the interpretation to be accorded to s. 340 sub-ss. (1), (2) and (3) of the National Land Code ('NLC'). More specifically, the appeal related to the construction to be afforded to the words "for the time being registered as proprietor of any land" appearing in sub-s. (1), which phrase is relevant for the purposes of construing sub-s. (2) of s. 340.

[2] This issue arose in the context of determining the competing interests of the parties to the appeal, arising as a consequence of an initial transfer of the subject landed property from the respondent (the plaintiff in the court below) to the appellants (the third and fourth defendants in the court below) by way of a forged power of attorney.

[3] The learned judge in the High Court, in a reasoned and comprehensive judgment, held that the appellants' title to the land was defeasible and should be set aside. However, as the property had by that date, been the subject matter of several subsequent sale and purchase transactions, such that it was now in the name of a *bona fide* purchaser for value without notice, it could not be re-transferred back to the respondent. Accordingly the learned judge ordered instead that damages be assessed on the basis of the market value of the property as of the date of judgment ie, on 3 July 2014.

[4] We heard this appeal on 20 November 2014 and dismissed it with costs but varied the date of assessment of damages stipulated in the judgment of the High Court from the date of the judgment on 3 July 2014 to the date of transfer of the subject property under the forged instrument to the appellants, ie, 17 July 2008.

[5] We append below the reasons for our dismissal of the appeal. For ease of reference, the parties will be referred to as they were in the court below. The appellants will be referred to as the third and fourth defendants, and the respondent as the plaintiff.

Brief Background Facts

[6] The facts relevant to this appeal may briefly be stated as follows:

(i) the plaintiff is the administrator of the estates of his deceased parents, Toni bin Ismail and Normy binti Mohamed Khatif. They died on 7 October 2002 and 7 September 2005 respectively. Their estate included a property held under Geran No. 32298, Lot No. 7186, Mukim of Cheras, Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur ('the property').

(ii) the plaintiff's elder brother, Jusrizal bin Toni ('Jusrizal') who was the second defendant in the court below, wrongfully and illegally sold and transferred the property to the third and fourth defendants, ie, the appellants here, using a forged instrument. Jusrizal did not enter appearance in the court below and judgment in default was obtained against him.

(iii) the third and fourth defendants subsequently sold and transferred the property to a fifth defendant, who charged the property to a sixth defendant, namely a bank as security for a loan granted by it to the fifth defendant. There was a default in the repayment of the loan, resulting in the property being foreclosed and purchased at auction by the seventh defendant, who is the current registered owner of the property.

(iv) the fifth, sixth and seventh defendants successfully brought an application to strike out the plaintiff's claim against them. There was no appeal against this decision, as a consequence of which, the plaintiff's action in the court below was primarily against the third and fourth defendants and the first defendant. It also follows that as the seventh defendant remains the current registered proprietor of the property, any remedy available to the plaintiffs, if at all, was only in damages.

(v) the first defendant was the Pengarah Tanah Dan Galian Wilayah Persekutuan. The claim against the first defendant was dismissed and there is no appeal against that part of the decision. Accordingly this appeal centred solely on the claim by the plaintiff as the original registered proprietor of the property against the third and fourth defendants, who as immediate purchasers, had acquired the property by way of a sale by Jusrizal utilising a forged power of attorney.

(vi) for the purposes of this appeal, it is not in dispute that the power of attorney dated 4 December 2006 utilised by Jusrizal ('the PA') was a false instrument (or forged) because the PA carries a date of execution

well after the death of the plaintiff's (and Jusrizal's) parents. They died on 7 October 2002 and 7 September 2005 respectively. The PA however carried the date 4 December 2006. Further, the name of the commissioner for oaths who had purportedly witnessed and attested the PA was also false.

The Decision Of The High Court In Relation To The Third And Fourth Defendants

[7] The learned judge, in adjudicating on this issue of law, with respect, correctly applied the landmark decision of the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269. Her Ladyship concluded that the title of the third and fourth defendants, as immediate purchasers of the property, was defeasible as registration in their names had been obtained by means of an insufficient or void instrument. As such s. 340 sub-s. (2)(b) of the NLC came into play, rendering their title defeasible. Her Ladyship made a finding, again with respect, entirely correctly, that the defence afforded by s. 340(3), namely deferred indefeasibility, was only available to a subsequent purchaser, which the third and fourth defendants were not.

[8] In other words, while the third and fourth defendants had purchased the property in good faith for value, this was of no avail, in light of the express provision of s. 340 sub-s. (2)(b) which stipulates that where the registered title or interest of a person is obtained by forgery or by means of a void instrument the title or interest of any such person or body shall not be indefeasible.

[9] Accordingly the learned judge awarded damages *in lieu* of a re-transfer of the property (as explained above).

The Appeal

[10] The thrust of the submission for the third and fourth defendants, as appellants was as follows:

(a) The learned judge was wrong in concluding that the third and fourth defendants were to pay damages to the plaintiff, given her finding that they were *bona fide* purchasers for value without notice. Reference was made to s. 340 sub-ss. (1) and (2) of the NLC, which provisions are reproduced here for ease of reference:

> 340 (1) The title or interest of any person or body **for the time being registered as proprietor of any land**, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any **such** person or body shall not be indefeasible ...

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) **where registration was obtained by forgery, or by means of an insufficient or void instrument**; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(emphasis added).

(b) Learned counsel for the third and fourth defendants submitted that reading s. 340 sub-ss. (1) and (2), more particularly the words in bold, it followed that the use of the word 'such' in sub-s. (2) must refer to "the title or interest of any person or body for the time being registered as proprietor of any land" in sub-s. (1). Thus interpolated, learned counsel submitted that the construction of s. 340 sub-s. (2)(b) would effectively be as follows:

> The title or interest of any such person or body (i.e. the person or body for the time being registered as proprietor of any land) shall not be indefeasible
>
> (b) where registration was obtained by forgery or by means of any insufficient or void instrument

(c) It was then submitted that in order for the plaintiff to succeed in establishing his case under s. 340 sub-s. (2)(b), the property must have been registered in the names of the third and fourth defendants at the time the suit was filed by the plaintiff on 9 August 2012.

(d) However, the third and fourth defendants had, on 31 March 2010 sold the property to the fifth defendant, which sale was registered on 11 August 2010. The property had then been charged to the sixth defendant and sold by public auction to the seventh defendant. As such when the plaintiff's suit was filed on 9 August 2012, the property was in the name of the seventh defendant.

(e) Therefore, it was contended for the third and fourth defendants, that s. 340 sub-s. (2)(b) was unavailable for use or application by the plaintiff as against them because the third and fourth defendants were not the registered proprietors of the property at the time when the suit was brought in August 2012.

(f) In other words, by giving a literal interpretation to the words "persons or body for the time being registered as proprietor of any land", it was submitted for the third and fourth defendants that the provisions of s. 340 sub-s. (2) are only available to be invoked by a party whose

property has been wrongfully or unlawfully registered in the name of another person or body (by the occurrence of any one of the events set out in sub-s. (2)) if and only if the property remains in the name of that other person or body.

(g) On the facts of our case, the submission was effectively this: s. 340 sub-s. (2) was not available to the plaintiff because the property was no longer registered in the names of the third and fourth defendants, but had become the subject matter of subsequent transactions, resulting in it being registered in the name of the seventh defendant. As such, the plaintiff could no longer have recourse to this statutory provision.

(h) On this basis, learned counsel for the third and fourth defendants submitted that the Federal Court decision of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 could be distinguished, as in that case the plaintiff was still the registered proprietor at the time of filing the suit. The 'rogue' first defendant there had charged the land to the defendant bank as security for a loan, using a forged power of attorney. There was default on the loan, and the bank demanded payment from the plaintiff. It was submitted that the bank was still the registered chargee at the time of filing the suit. Accordingly learned counsel submitted that, as the land was still registered in the name of the plaintiff, and the bank was still the registered chargee, s. 340 sub-s. (2)(b) was available to the parties. The situation there, it was submitted was unlike the situation here, where the property had passed through several transactions such that the third and fourth defendants were no longer "the person or body for the time being registered as proprietor of the property".

Analysis

[11] The crux of the submission in the appeal before us therefore, was that s. 340 sub-s. (2)(b) was no longer available to the plaintiff because he had only discovered the transfer of the property by the use of a forged instrument, after the property had changed hands from the third and fourth defendants to the other defendants, culminating in registration in the seventh defendant.

[12] In other words, the appellant's submission warranted a construction of the section such that the remedy afforded by s. 340 sub-s. (2)(b) would only be available to the plaintiff if he had discovered the use of the void instrument prior to the third and fourth defendants transacting on the property, or while the third and fourth defendants remained named as the registered proprietors.

[13] We were in effect invited to construe s. 340 sub-s. (2) so as to restrict its application, such that the remedy afforded would only be available to landowners whose title had been lost by reason of one of the instances set out in the sub-section, during the period when the property remained

registered in the hands of the immediate purchaser. Upon subsequent transfer or register to other parties, ie, subsequent acquirers, the entire remedy would no longer be available to the original landowner, simply because the fraudulent or unlawful transfer of title was discovered after a series of transactions, and not detected during the period when the property remained registered in the name of the immediate acquirer *vide* a fraudulent or void instrument.

[14] We were unable to agree with, or concede to such a construction of s. 340 sub-ss. (1) and (2) of the NLC. The reason is evident upon a reading of s. 340 sub-s. (3) which provides as follows:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) ...
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.'

[15] Sub-section (3) therefore clearly and expressly provides that where there has been a transfer of title premised on a void instrument rendering such title defeasible as envisaged in sub-s. (2), such transfer of title may be set aside not only when it is in the hands of a party who acquires immediate title, but is also liable to be set aside if it is subsequently transferred or registered in the names of purchasers who acquire title subsequent to the immediate purchaser.

[16] Applying sub-s. (3) to the instant case, it follows that as the title of the third and fourth defendants is defeasible under s. 340(2)(b) because it was obtained by means of a void instrument, namely the false PA, it is liable to be set aside in the hands of all subsequent transferees.

[17] However, the proviso to sub-s. (3) saves all succeeding transferees who acquire subsequent to, or from an immediate purchaser or acquirer, provided they acquire the property in good faith and for valuable consideration. In other words, such subsequent transferees acquire good title if they are *bona fide* purchasers for value without notice. The proviso therefore puts into statutory form the concept of deferred indefeasibility.

[18] In the instant case, the subsequent transferees were all *bona fide* purchasers for value without notice. Therefore, the proviso to sub-s. (3) saved their titles from being rendered defeasible.

[19] However, the fact that sub-s. (3) of s. 340 allows for the setting aside of a title registered in the names of subsequent transferees or purchasers, where such title has been acquired by fraud or a void instrument, in itself demonstrates that s. 340 sub-s. (2) cannot be construed so as to be limited to instances where a title is rendered defeasible only during such time as the impugned title remains registered in the name of an immediate purchaser, but not when it passes to a subsequent purchaser. This argument for the third and fourth defendants therefore fails.

Damages

[20] It was contended, for the third and fourth defendants that the learned judge of the High Court erred in awarding damages to the plaintiff, payable by the third and fourth defendants. It was submitted that damages were only available if the plaintiff had proved that he had been 'wronged' by the third and fourth defendants. As a finding of fact had been made that the third and fourth defendants had acquired the property in good faith and ignorant of the falsity of the PA, there ought to be no award of damages made against the third and fourth defendants.

[21] Again, we were unable to agree with this contention by learned counsel for the third and fourth defendants. The fallacy of the submission is this: by virtue of s. 340 sub-section (2)(b), the third and fourth defendants' title was defeasible. However, as the property had passed to the hands of a subsequent acquirer for value without notice as envisaged in the proviso to s. 340 sub-s. (3), namely the seventh defendant, it followed that the property could not be re-transferred back to the plaintiff.

[22] The plaintiff's remedy for the loss of the property, which is statutorily provided for in s. 340 sub-s. (2), is solely against the third and the fourth defendants. As they are not in a position to return the property to the plaintiff, they are bound to make good such loss by paying damages. The fact that the third and fourth defendants were 'innocent' in that they were unaware of the falsity of the PA does not absolve them from such liability, because it is statutorily imposed under the said section. The contention that no damages are payable because the plaintiff was not 'wronged' by the third and fourth defendants is therefore misconceived.

[23] It should also be borne in mind (as stated by the learned judge) that the third and fourth defendants had in fact acquired benefit from this property as they had on-sold it to the fifth defendant for a profit.

Amendment Of The Date For The Assessment Of Damages

[24] We did however allow an amendment of the date stipulated by the learned judge for the assessment of damages from 3 July 2014 (the date of the judgment) to the date when the property was transferred from the plaintiff to the third and fourth defendants by use of the false PA, namely 17 July

2008. We allowed this amendment because it appeared to us that the latter date more accurately reflected the basis for an estimation of loss to be computed, bearing in mind the entirety of the circumstances of the case.

[25] We therefore dismissed the appeal with costs but varied the date for the basis of assessment of damages as set out in para. (b)(ii) of the judgment of the High Court from the date of the judgment, ie, 3 July 2014, to the date of execution of the Form 14A between the fraudulent Jusrizal and the third and fourth defendants, ie, 17 July 2008.